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TRANSMITTAL LETTER (General - Patent Pending)	Docket No. 112703-00090

In Re Application Of: **Richey et al.**

Serial No.	Filing Date	Examiner	Group Art Unit
09/681,692	May 22, 2001	A. Corbin	1761

Title: **COATED CHEWING GUM AND METHOD FOR MAKING SAME**

TO THE DIRECTOR OF THE UNITED STATES PATENT AND TRADEMARK OFFICE:

Transmitted herewith is:

Appellants' Appeal Brief 18 pages in triplicate; Postcard

in the above identified application.

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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

Applicants:	Richey et al.
Appl. No.:	09/681,692
Conf. No.:	5308
Filed:	May 22, 2001
Title:	COATED CHEWING GUM AND METHOD FOR MAKING SAME
Art Unit:	1761
Examiner:	A. Corbin
Docket No.:	112703-090

Mail Stop: Appeal Brief-Patents
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APPELLANTS' APPEAL BRIEF

Dear Sir:

Appellants submit this Appeal Brief in support of the Notice of Appeal filed on January 13, 2004. This Appeal is taken from the Final Rejection dated July 17, 2003.

I. REAL PARTY IN INTEREST

The real party in interest for the above-identified patent application on appeal is Wm. Wrigley Jr. Company by virtue of an Assignment dated August 27, 2001 and recorded in the United States Patent and Trademark Office.

II. RELATED APPEALS AND INTERFERENCES

Appellants do not believe there are any known appeals or interferences which will directly affect or be directly affected by or have a bearing on the Board's decision with respect to the above-identified Appeal.

III. STATUS OF THE CLAIMS

Claims 1-36 are pending in this Application. A copy of appealed Claims 1-36 is attached hereto as the Appendix. In the Final Office Action dated July 17, 2003, Claims 1-36 are rejected under 35 U.S.C. §103(a) as being unpatentable over U.S. Patent No. 5,536,511 to Yatka et al. ("*Yatka*"), in view of U.S. Patent No. 5,336,509 to McGrew et al. ("*McGrew*"). A copy of the Final Office Action and the cited art is located in the Supplemental Appendix as Exhibits A-C.

IV. STATUS OF THE AMENDMENTS

No amendments after final were filed.

V. SUMMARY OF THE INVENTION

The summary of the invention on Appeal is provided as follows:

The present invention relates generally to confectionery products. More specifically, the present invention relates to coated chewing gum products and methods of making same. (Specification, page 1, lines 7-9)

In addition to providing a variety of shapes and forms of chewing gum products, a considerable amount of developmental activities has involved improving the flavor-release characteristics of chewing gum. One desired outcome is prolonging the release of flavor during the chew. A further desired result is enhancing the flavor perception. Increasing flavor perception to the consumer provides a more enjoyable chew. Additionally, increasing the level of flavor can also provide breath-freshening characteristics to the product. (Specification, page 1, lines 17-24)

Gumballs are well known in the confectionery industry as well as to consumers. Gumballs can comprise a chewing gum center that is coated with a hard shell. A product that is related to traditional gum balls are miniature coated pellets. A disadvantage of these miniature type chewing gum products is that they tend to lose their flavor quickly during the chew. Further, at least some of these products do not provide the consumer with much flavor during the chew. (Specification, page 1, lines 25-32)

The present invention provides improved chewing gum products as well as methods of manufacturing same. In the preferred embodiment, the present invention provides improved

coated chewing gum products as well as methods of making same. The products have improved flavor-release characteristics. Additionally, the products are designed to provide improved flavor perception as compared to similar type products. In an embodiment, this provides an improved breath freshening product. (Specification, page 4, lines 6-12)

The inventors have surprising discovered that, by producing a gum composition that has a high level of base and little or no bulk sweetener, a product is produced that has improved flavor perception during the chew. Such a product is especially advantageous for use with gumballs and reduced-sized chewing products, especially coated products. Due to the small size of some reduced products, consumers are able to reload or add more products in their mouth as they chew the initial pieces. This offers a consumer the opportunity to control cud size, flavor, and/or freshness enhancement during the time period they chew. (Specification, page 4, lines 13-20)

In general, chewing gum compositions typically comprise a water-soluble portion and a water insoluble portion. The water insoluble portion is referred to as gum base. The water insoluble gum base may typically contain any combination of elastomers, resins, fats and oils, softeners, and inorganic fillers. The gum base may or may not include wax. The insoluble gum base may constitute approximately 50 to about 95% by weight of the chewing gum, in an embodiment the gum base comprises 65 to about 75% by weight of the chewing gum. (Specification, page 4, lines 21-28)

Pursuant to the present invention the chewing gum contains little or no bulk sweeteners. Bulk sweeteners of the present invention comprise less than 5% by weight of the chewing gum center. In an embodiment, the chewing gum does not include any bulk sweeteners. (Specification, page 5, lines 16-19)

Flavor should generally be present in the chewing gum in an amount within the range of approximately 0.1% to about 25% by weight of chewing gum, in an embodiment, approximately 3% to about 20%, and, in a further embodiment, approximately 5% to about 15% by weight of the chewing gum. Flavoring agents may include essential oils, synthetic flavors, or mixtures thereof including, but not limited to, oils derived from plants and fruits such as citrus oils, fruit oils, clove oil, oil of wintergreen, anise, menthol, and the like. Artificial flavoring agents and components may also be used in the flavor ingredient of the invention. Natural and artificial

flavoring agents may be combined in any sensorally acceptable fashion. (Specification, page 5, lines 27-32)

Optional ingredients such as colors, emulsifiers, pharmaceutical agents and additional flavoring agents may also be included in the chewing gum. (Specification, page 6, lines 4-5)

In a preferred embodiment, the present invention is utilized to produce a chewing gum product that is formed into miniature sized balls. Other alternative processes, such as extrusion, cutting and tumbling, may be employed by those skilled in the art to produce round (spherical) centers. Of course, if desired, any shaped product can be produced. For example, in an embodiment, pellet shaped products are produced. (Specification, page 6, lines 11-18)

In a preferred embodiment, the present invention provides a coated chewing gum product. Once the gum center has been made and formed, the gum center is coated. The gum center can be coated or panned by conventional panning techniques to make a coated miniature ball gum. The coating for the present invention may comprise approximately 50 to about 95% by weight of the entire coated product. In an embodiment approximately 80 to about 90% by weight of the gum product is coating. Sugar or sugarless sweeteners may also be used in the coating composition. (Specification, page 6, lines 6-10 and lines 19-21)

The coating that is used to produce the coated gum product may contain ingredients such as flavoring agents, artificial sweeteners, dispersing agents, coloring agents, film formers and binding agents. (Specification, page 7, lines 5-7)

Flavoring agents contemplated in the present invention include those commonly known in the art such as essential oils, synthetic flavors or mixtures thereof, including, but not limited to, oils derived from plants and fruits such as citrus oils, fruit essences, peppermint oil, spearmint oil, other mint oils, clove oils, oil of wintergreen, anise, menthol, and the like. The flavoring agents may be added to the coating syrup in an amount such that the coating will contain from approximately 0.1% to about 12% by weight flavoring agent, and, in an embodiment, from approximately 2.0% to about 6.0% by weight flavoring agent (based on dry solids). (Specification, page 7, lines 7-15)

Artificial sweeteners contemplated for the use in the coating include, but are not limited to, synthetic substances, saccharin, thaumatin, alitame, saccharin sales, aspartame, sucralose, and acesulfame K. The artificial sweetener may be added to the coating syrup in an amount such that

the coating will contain from approximately 0.05% to about 1.0% by weight artificial sweetener, and in an embodiment from approximately 0.30% to about 0.60% by weight artificial sweetener. (Specification, page 7, lines 16-21)

Dispersing agents are often added to a syrup that is used to produce the coating for the purpose of whitening and tack reduction. Dispersing agents contemplated by the present invention to be employed in the coating syrup include titanium dioxide, talc, or any other anti-stick compound. The dispersing agent may be added to the coating syrup in amounts such that the coating will contain approximately 0.1% to about 5.0% and in an embodiment from approximately 1.0% to about 2.0% by weight of the agent. (Specification, page 7, lines 22-28)

VI. ISSUE

The issue on Appeal is as follows:

1. Would Claims 1-36 have been obvious at the time of the invention to one of ordinary skill in the art under 35 U.S.C. §103 in view of *Yatka* and *McGrew*?

VII. GROUPING OF THE CLAIMS

Appellants do not argue for the separate patentability of the claims.

VIII. ARGUMENT

A. The Claimed Invention -- Independent Claims

Claims 1-36 are on Appeal. Of these claims, Claims 1, 10, 17, 21 and 30, are independent claims. Independent Claims 1, 10, 17, 21 and 30 provide as follows:

Independent Claim 1 recites a coated chewing gum product. The coated chewing gum product includes a gum center and a coating that at least substantially surrounds the gum center. The gum center includes a water soluble portion and a water insoluble portion that comprises at least 50% by weight of the gum center. The gum center includes less than 5% by weight of bulk sweeteners.

Independent Claim 10 recites a coated chewing gum product. The coated chewing gum product includes a gum center and a coating that at least substantially surrounds the gum center and comprises at least 50% by weight of the coated chewing gum composition. The gum center includes a water soluble portion and a water insoluble portion that comprises at least 50% by weight of the gum center. The gum center includes a flavoring agent that comprises at least 0.1% by weight of the gum center and less than 5% by weight of a bulk sweetener.

Independent Claim 17 recites a method of improving flavor perception in a coated chewing gum product. The method includes providing a coated chewing gum product that includes a gum center that comprises at least 50% by weight gum base and less than 5% bulk sweeteners.

Independent Claim 21 recites a coated chewing gum product. The coated chewing gum product includes a gum center and a coating that at least substantially surrounds the gum center. The gum center includes a water insoluble portion that comprises at least 50% by weight of the gum center. The gum center includes less than 5% by weight of bulk sweeteners.

Independent Claim 30 recites a coated chewing gum product. The coated chewing gum product includes a gum center and a coating that substantially surrounds the gum center and comprises at least 50% by weight of the coated chewing gum composition. The gum center includes a water insoluble portion that comprises at least 50% by weight of the gum center and less than 5% by weight of a bulk sweetener.

B. The Rejections

Claims 1-36 are rejected under 35 U.S.C. § 103 as being unpatentable over *Yatka* in view of *McGrew*. The Patent Office essentially asserts that the cited references, in combination, disclose or suggest each of the features of the claimed invention.

C. The Patent Office Has Failed to Establish a *Prima Facie* Case of Obviousness

Appellants respectfully submit that the rejection of Claims 1-36 under 35 U.S.C. §103 should be reversed based on the fact that the Patent Office has failed to establish a *prima facie*

case of obviousness. Appellants submit that there is no suggestion, teaching or motivation to combine *McGrew* with *Yatka* and that *McGrew* teaches away from a combination with *Yatka*.

1. The Applicable Law

The Court of Appeals for the Federal Circuit has held that the legal determination of an obviousness rejection under 35 U.S.C. §103 is:

> whether the claimed invention as a whole would have been obvious to a person of ordinary skill in the art at the time the invention was made...The foundation facts for the *prima facie* case of obviousness are: (1) the scope and content of the prior art; (2) the difference between the prior art and the claimed invention; and (3) the level of ordinary skill in the art...Moreover, objective indicia such as commercial success and long felt need are relevant to the determination of obviousness....Thus, each obviousness determination rests on its own facts.

In re Mayne, 41 U.S.P.Q. 2d 1451, 1453 (Fed. Cir. 1997). In making this determination, the Patent Office has the initial burden of proving a *prima facie* case of obviousness. *In re Rijckaert*, 9 F.3d 1531, 1532, 28 U.S.P.Q. 2d 1955, 1956 (Fed. Cir. 1993). This burden may only be overcome "by showing some objective teaching in the prior art or that knowledge generally available to one of ordinary skill in the art would lead that individual to combine the relevant teachings." *In re Fine*, 837 F.2d 1071, 1074, 5 U.S.P.Q.2d 1596, 1598 (Fed. Cir. 1988). Even if the combination of the references teaches every element of the claimed invention, without a motivation to combine, a rejection based on a *prima facie* case of obviousness is improper. *In re Rouffet,* 149 F.3d 1350, 1357, 47 USPQ2d 1453, 1457-58 (Fed. Cir. 1998). Moreover, the level of skill in the art cannot be relied upon to provide the suggestion to combine references. *Al-Site Corp. v. VSI Int'l Inc.*, 174 F.3d 1308, 50 USPQ2d 1161 (Fed. Cir. 1999). "The mere fact that the prior art may be modified in the manner suggested by the Examiner does not make the modification obvious unless the prior art suggested the desirability of the modification." *In re Fritch*, 23 U.S.P.Q. 2d 1780, 1783-84 (Fed. Cir. 1992).

A suggestion, teaching or motivation to combine known elements of prior art references is essential for an obviousness rejection in order to avoid invalidating patentable claims based on hindsight. The Federal Circuit has held that it is "impermissible to use the claimed invention as

an instruction manual or 'template' to piece together the teachings of the prior art so that the claimed invention is rendered obvious." *In re Fritch*, at 1784. "One cannot use hindsight reconstruction to pick and choose among isolated disclosures in the prior art to deprecate the claimed invention. *In re Fine*, 837 F.2d at 1075. (Fed. Cir. 1988). The art itself must contain something to suggest the desirability of the proposed combination. *In re Grabiak*, 769 F.2d 729, 226 USPQ 870 (Fed. Cir. 1985).

Also, it is improper to combine references where a reference teaches away from their combination. *In re Grasselli*, 713 F.2d 731, 743, 218 USPQ 769, 779 (Fed. Cir. 1983). "A prior art reference may be considered to teach away when a person of ordinary skill, upon reading the reference would be discouraged from following the path set out in the reference, or would be led in a direction divergent from the path that was taken by the Applicant." *Monarch Knitting Machinery Corp. v. Fukuhara Industrial Trading Co., Ltd.*, 139 F.3d 1009 (Fed. Cir. 1998), quoting, *In re Gurley*, 27 F.3d 551 (Fed. Cir. 1994).

Moreover, the Federal Circuit has held that "obvious to try" is not the standard under 35 U.S.C. §103. *Ex* parte *Goldgaber,* 41 U.S.P.Q.2d 1172, 1177 (Fed. Cir. 1996). "An obvious-to-try situation exists when a general disclosure may pique the scientist's curiosity, such that further investigation might be done as a result of the disclosure, but the disclosure itself does not contain a sufficient teaching of how to obtain the desired result, or that the claim result would be obtained if certain directions were pursued." *In re Eli Lilly and Co.*, 14 U.S.P.Q.2d 1741, 1742 (Fed. Cir. 1990).

"If the examination at the initial stage does not produce a *prima facie* case of unpatentability, then without more the appellant is entitled to grant of the patent." *In re Oetiker*, 24 U.S.P.Q. 2d 1443, 1444 (Fed. Cir. 1992).

If a *prima facie* case of obviousness is established, the burden shifts to the applicant to come forward with arguments and/or evidence to rebut the *prima facie* case. See, e.g., *Dillon,* 919 F.2d at 692, 16 USPQ2d at 1901. Rebuttal evidence and arguments can be presented in the specification, *In re Soni*, 54 F.3d 746, 750, 34 USPQ2d 1684, 1687 (Fed. Cir. 1995). Further, rebuttal evidence may include evidence that the claimed invention yields unexpectedly improved

properties or properties not present in the prior art. *Dillon*, 919 F.2d at 692-93, 16 USPQ2d at 1901.

Appellants respectfully submit that the Patent Office has failed to overcome its *prima facie* burden with respect to the rejection of Claims 1-36 under 35 U.S.C. §103 by improperly combining *McGrew* with *Yatka* to support the obviousness rejections and that Appellants have overcome these rejections with secondary considerations.

2. The Patent Office has Failed to Establish the Necessary Motivation to Combine the Teachings of *McGrew* with the Teachings of *Yatka*

To support its combination and/or modification of the cited art to arrive at the claimed invention, the Patent Office has applied hindsight reconstruction by selectively piecing together teachings of *McGrew* with the teachings of *Yatka* in an attempt to recreate what the claimed invention discloses. Of course, as discussed above, without the requisite motivation to combine these teachings, this is clearly improper as being "hindsight reconstructive". *See In re O'Farrell,* 853 F.2d., 894, 902-903 (Fed. Cir. 1988).

a. There is no Suggestion, Teaching or Motivation to Combine *McGrew* with *Yatka*

Even if the combination of the *McGrew* reference with the *Yatka* reference would suggest the claimed invention, Appellants believe that there is no teaching or suggestion in either of the cited references to motivate one of ordinary skill in the art at the time of the present invention to combine the cited references.

The primary focus of the *Yatka* reference relates to a hard coating of a chewing gum product and, more particularly, to replacing xylitol with erythritol in a hard coating of a chewing gum product. As impliedly admitted by the Patent Office, *Yatka* does not disclose or suggest a composition which includes less than 5% of bulk sweetener as is specifically claimed in all of the composition and method claims of the present invention. *See* Office Action dated February 6, 2003 at page 2. Therefore, the Patent Office must rely on *McGrew* to remedy the deficiencies of *Yatka*.

There is no motivation to combine *McGrew* with *Yatka*. The primary focus of *McGrew* is a wax-free chewing gum composition. *McGrew* teaches decreasing flavor levels in a low calorie, high base chewing gum product having a wax-free gum base. *See McGrew*, Col. 2, lines 37-42. In contrast, *Yatka* teaches a chewing gum composition that comprises wax. *See Yatka*, Col. 4, lines 53-55. Furthermore, unlike *Yatka* which, as discussed above, is directed to improvements in a hard coating of a chewing gum product, *McGrew* fails to even mention providing a coating to the wax-free gum formulation. Therefore, Appellants respectfully submit that one of ordinary skill in the art would not be motivated by either *Yatka* or *McGrew* to combine these references.

The Patent Office fails to provide a basis or motivation for combining these references. The Patent Office combines *McGrew* with *Yatka* in an attempt to provide evidence that "it is old to prepare chewing gum in which bulk sweetener is eliminated." *See* page 2 of Office Action dated February 6, 2003. The Patent Office contends in a later Office Action that *McGrew* is properly combinable with *Yatka* because "wax is not essential to the gum products of *Yatka.*" *See* Office Action dated July 17, 2003, page 2. The Patent Office, however, draws this conclusion from an inaccurate observation that "none of *Yatka*'s examples use any waxes."

Contrary to the assertion of the Patent Office, the chewing gum product of *Yatka* includes an insoluble gum base which comprises waxes. The disclosure in *Yatka* makes clear that the insoluble gum base comprises waxes along with elastomers, elastomer solvents, plasticizers, emulsifiers and inorganic fillers. *See Yatka*, Col. 4, lines 53-55. In fact, *Yatka* goes on to discuss commonly employed waxes which include paraffin, microcrystalline and natural waxes among others. *See Yatka*, Col. 4, lines 66-67. Moreover, *Yatka* teaches other uses for waxes as bodying agents or textural modifiers. *See Yatka*, Col. 5, lines 1-3. The waxes along with the other components of the gum base are included in each of the nineteen different center formulae disclosed in *Yatka* and are collectively referred to in each center formula as "Base". *See* Tables I-IV. There is nothing in *Yatka* to suggest minimizing or eliminating waxes in the gum base. Therefore, *Yatka* teaches including waxes in the insoluble gum base of the gum product.

b. *McGrew* Teaches Away from a Combination with *Yatka*

Not only is there no motivation to combine *McGrew* with *Yatka*, the teaching in *McGrew* to minimize or eliminate waxes from a gum base constitutes a teaching away from its

combination with the teachings of *Yatka* requiring wax in a gum base of a chewing gum product. In its disclosure, *McGrew* teaches that typical gum bases containing wax will bind with flavor preventing its release, thereby decreasing its perception to the chewer. *See McGrew*, Col. 24, lines 35-37. To solve this problem, *McGrew* teaches minimizing or eliminating waxes from the gum base to allow the reduction of costly flavor ingredients required in the composition of typical low-calorie, high-base chewing gums. *See McGrew*, Col. 2, lines 61-65. In addition, *McGrew* discusses other disadvantages of using wax in gum products including regulatory issues, chewing gum tackiness and instability of the gum product. *See McGrew*, Col. 1, lines 43-50 and Col. 2, lines 27-30.

Furthermore, the results of the experimentation conducted in *McGrew* suggest that removal of wax from a gum base improves chew characteristics of a resulting gum product. *See McGrew,* Col. 19, lines 13-18. Out of the 105 examples disclosed in *McGrew*, none include wax. *See* Tables 1-3. Wax is only included in control samples for comparison of chew characteristics to the different no wax formulations. *See McGrew* Col. 19, lines 19-23. The experimental results in *McGrew* disclose a preference among test subjects for wax-free gum products based on characteristics such as taste, taste duration, texture, sweetness, softness, and flavor strength. *See* Examples 1A, 2A and 3A. Therefore, Applicants submit that, insofar as *McGrew* is solely directed to wax-free chewing gum compositions, *McGrew* clearly constitutes a teaching away from *Yatka* which, as mentioned above, includes a number of waxes as preferred components in the chewing gum base.

As the Federal Circuit explained, "the mere fact that the prior art may be modified in the manner suggested by the examiner does not make the modification obvious unless the prior art suggested the desirability of the modification." *In re Fritch*, at 1783-84. It is clear from the discussion above that neither of the cited references, alone or in combination, recognize the importance that producing a gum composition with a high level of base and little or no bulk sweetener has on the flavor release and breath freshening characteristics. Furthermore, *McGrew* cannot be combined with *Yatka* where *McGrew* clearly teaches away from their combination. *In re Grasselli* at 779. Consequently, neither of the cited references suggest the desirability of this modification as required by *In re Fitch*.

D. The Claimed Invention Provides Unexpected Results.

Even if the Patent Office is able to establish a prima facie case of obviousness, which Appellants submit it has not, Appellants have demonstrated unexpected results rebutting same. Appellants' claimed invention results in unexpectedly enhanced the intensity and duration of flavor release and breath freshening characteristics of a coated gum product.

Experimental studies demonstrate the unexpected results from using a high level of base and little or no bulk sweetener in a coated chewing gum formulation, especially in miniaturized coated gum products. For example, on pages 8-10 of the instant patent application, experimental gum and coating compositions are discussed. Example 2 represents one of the gum center compositions and is combined with one of the coating compositions to form a miniature coated gumball. The resulting gum product is an example of a gum composition having a gum center that includes a water insoluble portion comprising at least 50% by weight of the gum center and less than 5% by weight bulk sweeteners. Specifically, the gum center composition of Example 2 includes a gum base comprising 64.9% by weight of the gum center and no bulk sweetener. In blind taste testing of four gumballs, 56% of the participating subjects rated the gum product as more breath freshening and 45% of the participating subjects rated the gum product as having a longer lasting flavor as compared to other commercially available coated chewing gum products. If the participating subjects were allowed to take in more gumballs while chewing the initial four pieces, the breath freshening characteristics and the perception of having a longer lasting flavor increased to 59% and 47%, respectively

In view of these unexpected results demonstrating the beneficial effects of the claimed invention, Appellants submit that they have rebutted any *prima facie* case of obviousness established by the Patent Office.

Accordingly, Appellants respectfully request that the rejection of Claims 1-36 under 35 U.S.C. §103 be reversed.

IX. CONCLUSION

Appellants' claimed invention set forth in claims 1-36 is neither taught nor suggested by each of the cited references and the combination of the cited references is improper. The Patent

Office, therefore, has failed to establish a *prima facie* case of obviousness with respect to the rejection of claims 1-36. In addition, Appellants have rebutted any *prima facie* case of obviousness with secondary considerations including unexpected results. Accordingly, Appellants respectfully submit that the rejections of the pending claims as being obvious are erroneous in law and in fact and should therefore be reversed by this Board.

Respectfully submitted,

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Date: March 15, 2004

APPENDIX

1. A coated chewing gum product comprising:

a gum center that includes a water soluble portion and a water insoluble portion, the water insoluble portion comprising at least 50% by weight of the gum center, the gum center including less than 5% by weight of bulk sweeteners; and

a coating that at least substantially surrounds the gum center.

2. The coated chewing gum product of Claim 1 wherein the coating comprises at least 50% by weight of the coated chewing gum product.

3. The coated chewing gum product of Claim 1 wherein the coating comprises at least 80% by weight of the coated chewing gum product.

4. The coated chewing gum product of Claim 1 wherein the gum center does not include any bulk sweetener.

5. The coated chewing gum product of Claim 1 wherein the insoluble portion comprises at least 65% by weight of the gum center.

6. The coated chewing gum product of Claim 1 wherein the product has a spherical shape.

7. The coated chewing gum product of Claim 1 wherein the gum center includes 0.1 to 25% by weight flavor.

8. The coated chewing gum product of Claim 1 wherein the gum center is wax-free.

9. The coated chewing gum product of Claim 1 wherein the coating includes:

at least 0.1% to about 12% flavoring;

at least 0.05% to about 1.0% by weight artificial sweetener; and

at least 0.1% to about 5% by weight dispersing agent.

10. A coated chewing gum product comprising:

a gum center including a water soluble portion and a water insoluble portion, the water insoluble portion comprising at least 50% by weight of the gum center, the gum center including a flavoring agent that comprises at least 0.1% by weight of the gum center and less than 5% by weight of a bulk sweetener; and

a coating that substantially surrounds the gum center and comprises at least 50% by weight of the coated chewing gum composition.

11. The coated chewing gum product of Claim 10 wherein the gum center does not include any bulk sweetener.

12. The coated chewing gum product of Claim 10 wherein the insoluble portion comprises at least 65% by weight of the gum center.

13. The coated chewing gum product of Claim 10 wherein the product has a spherical shape.

14. The coated chewing gum product of Claim 10 wherein the coating includes:

at least 0.1% to about 12% flavoring;

at least 0.05% to about 1.0% by weight artificial sweetener; and

at least 0.1% to about 5% by weight dispersing agent.

15. The coated chewing gum product of Claim 10 wherein the product has a pellet like shape.

16. The coated chewing gum product of Claim 10 wherein the gum center is sugarless.

17. A method of improving flavor perception in a coated chewing gum product comprising the steps of: providing a coated chewing gum product that includes a gum center that comprises at least 50% by weight gum base and less than 5% bulk sweeteners.

18. The method of Claim 17 including the steps of coating a gum center with a syrup coating to produce the coated chewing gum product.

19. The method of Claim 17 wherein the gum center does not include any bulk sweetener.

20. The method of Claim 17 including the step of using a panning process to produce the coated chewing gum product.

21. A coated chewing gum product comprising:

a gum center that includes a water insoluble portion, the water insoluble portion comprising at least 50% by weight of the gum center, the gum center including less than 5% by weight of bulk sweeteners; and

a coating that at least substantially surrounds the gum center.

22. The coated chewing gum product of Claim 21 wherein the coating comprises at least 50% by weight of the coated chewing gum product.

23. The coated chewing gum product of Claim 21 wherein the coating comprises at least 80% by weight of the coated chewing gum product.

24. The coated chewing gum product of Claim 21 wherein the gum center does not include any bulk sweetener.

25. The coated chewing gum product of Claim 21 wherein the insoluble portion comprises at least 65% by weight of the gum center.

26. The coated chewing gum product of Claim 21 wherein the product has a spherical shape.

27. The coated chewing gum product of Claim 21 wherein the gum center includes 0.1 to 25% by weight flavor.

28. The coated chewing gum product of Claim 21 wherein the gum center is miniature.

29. The coated chewing gum product of Claim 21 wherein the gum center is miniature and does not include any bulk sweetener.

30. A coated chewing gum product comprising:

a gum center including a water insoluble portion comprising at least 50% by weight of the gum center and less than 5% by weight of a bulk sweetener; and

a coating that substantially surrounds the gum center and comprises at least 50% by weight of the coated chewing gum composition.

31. The coated chewing gum product of Claim 30 wherein the gum center does not include any bulk sweetener.

32. The coated chewing gum product of Claim 30 wherein the insoluble portion comprises at least 65% by weight of the gum center.

33. The coated chewing gum product of Claim 30 wherein the product has a spherical shape.

34. The coated chewing gum product of Claim 30 wherein the center is miniature and does not include any bulk sweetener.

35. The coated chewing gum product of Claim 30 wherein the product has a pellet like shape.

36. The coated chewing gum product of Claim 30 wherein the gum center is miniature.

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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/681,692	05/22/2001	Lindell C. Richey	112703-090	5308

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EXAMINER
CORBIN, ARTHUR L

ART UNIT	PAPER NUMBER
1761	

DATE MAILED: 07/17/2003

DUE: 10-17-03

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.	Applicant(s)
09/681,692	RICHEY ET AL
Examiner	**Group Art Unit**
ARTHUR L. CORBIN	1761

The MAILING DATE of this communication appears on the cover sheet beneath the correspondence address–

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, such period shall, by default, expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

☒ Responsive to communication(s) filed on 5-5-03.

☒ This action is **FINAL.**

☐ Since this application is in condition for allowance except for formal matters, **prosecution as to the merits is closed** in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 1 1; 453 O.G. 213.

Disposition of Claims

☒ Claim(s) 1-36 is/are pending in the application.

Of the above claim(s) _____ is/are withdrawn from consideration.

☐ Claim(s) _____ is/are allowed.

☒ Claim(s) 1-36 is/are rejected.

☐ Claim(s) _____ is/are objected to.

☐ Claim(s) _____ are subject to restriction or election requirement

Application Papers

☐ The proposed drawing correction, filed on _____ is ☐ approved ☐ disapproved.

☐ The drawing(s) filed on _____ is/are objected to by the Examiner

☐ The specification is objected to by the Examiner.

☐ The oath or declaration is objected to by the Examiner.

Priority under 35 U.S.C. § 119 (a)–(d)

☐ Acknowledgement is made of a claim for foreign priority under 35 U.S.C. § 119 (a)–(d).

☐ All ☐ Some* ☐ None of the:

☐ Certified copies of the priority documents have been received.

☐ Certified copies of the priority documents have been received in Application No. _____.

☐ Copies of the certified copies of the priority documents have been received in this national stage application from the International Bureau (PCT Rule 17.2(a))

*Certified copies not received: _____.

Attachment(s)

☐ Information Disclosure Statement(s), PTO–1449, Paper No(s). _____

☐ Interview Summary, PTO–413

☐ Notice of Reference(s) Cited, PTO–892

☐ Notice of Informal Patent Application, PTO–152

☐ Notice of Draftsperson's Patent Drawing Review, PTO–948

☐ Other _____

Office Action Summary

1. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

2. Claims 1-36 are rejected under 35 U.S.C. 103(a) as being unpatentable over Yatka (5,536,511, cols. 4-7) in view of McGrew et al (5,336,509).

Applicant is referred to the reasoning set forth in paragraph No. 3, Paper No. 7.

3. Applicant's arguments filed May 5, 2003 have been fully considered but they are not persuasive. Applicant's reference to the use of waxes by Yatka [redacted] is not convincing set Yatka [redacted] neither requires that waxes be present nor discloses that waxes are essential and since applicant only claims a wax-free product in claim 8. Moreover, none of Yatka's [redacted] examples use any waxes. As a result it would have been obvious to eliminate any wax with its function if it was present in Yatka's [redacted] gum product, if a wax-free gum product is desired.

The disadvantages of using wax in chewing gum products as discussed in McGrew et al (col. 1, lines 23-29) and referenced by applicant occurs in the background section of McGrew et al and only applies to gum products sold in the United Kingdom. Although McGrew et al may prefer to produce wax-free products, the products could be substantially wax-free (col. 2, line 47), thereby permitting the presence of small amounts of wax. Nevertheless, since wax is not essential to the gum products of Yatka, [redacted]

McGrew et al is properly combinable with Yatka, [redacted], despite applicant's contention to the contrary.

4. **THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

5. Any inquiry concerning this communication from the examiner should be directed to Arthur Corbin whose telephone number is (703) 308-3850. The examiner can generally be reached on Tuesday--Friday from 10 a.m. to 7:30 p.m. and on alternate Mondays.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on (703) 308-3959. The fax phone numbers for the organization where this application is assigned are (703) 872-9310 for regular communications and (703) 305-7115 for After Final communications.

Any inquiry of a general nature or relating to the status of this application should be directed to the receptionist whose telephone number is (703) 308-0661.

A. Corbin/dh
June 27, 2003

ARTHUR L. CORBIN
PRIMARY EXAMINER
6-30-03